

DIMINISHING BORDERS IN TRADE AND TERRORISM: AN EXAMINATION OF REGIONAL APPLICABILITY OF GATT ARTICLE XXI NATIONAL SECURITY TRADE SANCTIONS

*Eric J. Lobsinger**

I.	INTRODUCTION	100
II.	SANCTIONS PAST AND PRESENT	102
	A. <i>Background to GATT Article XXI</i>	102
	1. <i>Drafting of Article XXI</i>	102
	2. <i>Past Usage of Article XXI</i>	104
	3. <i>Creation of WTO and Its Usage</i>	105
	B. <i>Present Sanctions in the War on Terrorism</i>	108
	1. Recent Counterterrorism Actions	108
	2. Traditional Whole-Nation Sanctions	110
	3. Diplomacy, Politics, and Institutions	111
	C. <i>Problems with the Present Model</i>	113
	1. Humanitarian Concerns	113
	2. Internationalization and Global Regionalism of Terrorism	113
	3. Financing of Terrorism	117
III.	AN ALTERNATIVE APPROACH TO APPLYING TRADE SANCTIONS	122
	A. <i>Regional Trade Sanctions in Response to Non-State Terrorism</i>	122
	1. The Application of Regional Sanctions	122
	2. Flexibility of Article XXI	124
	3. Sanctions and the Diamond Trade	125
	B. <i>Advantages of Regional Sanctions</i>	126
	1. Effective Against Non-State Terrorism	126
	2. Effective for International Relations	129
	C. <i>Possible Criticisms of Targeted Sanctions</i>	133
	1. Lack of Relevance and Effectiveness	133
	2. The Problem of Standing	134
	3. National treatment	136
IV.	CONCLUSION	137

* LL.D. candidate, Kyushu University, Graduate School of Law, Fukuoka, Japan. LL.M., Kyushu University, 2004; J.D., Washington University in St. Louis, 2003; A.B., Washington University in St. Louis, 2000. The author would like to give special thanks to Minette J. F. Lobsinger for her valuable suggestions and help.

I. INTRODUCTION

The concept of “war” has undergone extensive usage in U.S. foreign policy since the terrorist attacks of September 11, 2001. Not allowing itself to be confined by formal declarations, finite military objectives, and other characteristics of traditional warfare, the U.S. government has adopted a broad usage of the word “war” to define its counterterrorism measures. Indeed, the “war on terrorism” has revived attempts to redefine “war” along with the legal implications that are associated with various forms of armed conflict.¹

The politically fluid understanding of “war” has practical concerns for international legal norms, not least because of the high stature counterterrorism has been placed in U.S. foreign policy concerns.² Not only can the legal ambiguity of “war on terrorism” be expected to continue to influence the American approach to armed conflicts in the form of non-normative policies,³ but economic measures may also take hitherto unconventional forms to counteract terrorist funding.⁴ Because restrictive trade regulations, particularly sanctions, are a common method of employing economic measures against perceived antagonistic foreign interests, it may be of practical value to examine the legality and feasibility of alternative possibilities to traditional trade sanctions for national security objectives.

Before speculating on the possible merits and shortcomings of a new approach to national security trade sanctions, however, it is necessary to analyze the legal background and practice of conventional sanctions. Thus, the first section of this Paper seeks to explore the effect of trade sanctions in

1. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 7 (2004). To highlight the legal implications of approaching counterterrorism as a “war,” the French government, in contrast, has adopted a criminal law approach, see Michael Steinberger, *The War on Terror's Legal Challenges*, FIN. TIMES (Asia ed.), Jan. 8–9, 2005, at Weekend 3. It should be noted, however, that the “war on terrorism” has also been dismissed as mere rhetoric rather than an actual paradigm shift in law, see Yoram Dinstein, *The Rule of Law in Conflict and Post-Conflict Situations: Comment on War*, 27 HARV. J.L. & PUB. POL'Y 877 (2004); Moreover, the formal concept of “war” itself has undergone change since the end of World War II; see BRIAN HALLETT, *THE LOST ART OF DECLARING WAR* (1998).

2. Counterterrorism, including a “war” against terrorists, has taken a primary place in U.S. foreign policy; see THE WHITE HOUSE, EXECUTIVE OFFICE OF THE PRESIDENT, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* (2002) [hereinafter NSS], available at <http://www.whitehouse.gov/nsc/nssall.html> (last visited Sept. 26, 2006).

3. The U.S. use of preemptive self-defense as justification for the invasion of Iraq in 2003 has been criticized as a violation of international norms. E.g., Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT'L L. 607, 610–14 (2003); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 797 (2004); contra William H. Taft IV & Todd F. Buchwald, *Agora: Future Implication of the Iraq Conflict: Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003).

4. The NSS presents the importance of disruption of terrorist funding as a critical step in counterterrorism measures. NSS, *supra* note 2.

today's fight against modern international terrorism, and specifically to explore the structural inadequacies of utilizing conventional trade sanctions as weapons against the evolving forms of terrorism. Due to the breadth of the subject, though, this Paper limits itself to national security sanctions as specifically permitted by Article XXI in the General Agreement on Tariffs and Trade (GATT).⁵ Article XXI provides that:

Nothing in this Agreement shall be construed:

- a. to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- b. to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - i. relating to fissionable materials or the chemicals from which they are derived;
 - ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - iii. taken in time of war or other emergency in international relations; or
- c. to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁶

Currently, Article XXI sanctions are placed on national political units, but with terrorists increasingly shedding national identities, the traditional rationale of using sanctions, either to punish nation states for supporting terrorism or to coerce nation states into relinquishing ties to international terrorism, has become outdated. This Paper will examine the history of GATT Article XXI, starting with the drafting history of the Article as well as early usage of the security exception. A historical look at Article XXI and at the GATT ought to provide valuable clues as to the original intent of the security exception as well as the formative practices of the exception, which can be compared and contrasted with later trade rules.

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (incorporating into the General Agreement on Tariffs and Trade 1994, Annex 1A of the WTO Agreement at ¶ 1(a)).

6. GATT, *supra* note 5 at art. 21.

The Paper will then turn to the intention behind the creation of the World Trade Organization (WTO),⁷ the historic revolution in international trade disputes. The application of Article XXI, naturally, changed in light of the new system. Since the WTO is the present framework from which to understand security-related trade sanctions, an examination of WTO disputes reveals the possible legal limits of Article XXI. Furthermore, this Paper will look at how sanctions are applied today. Today's sanctions against nation states continue the traditional view of state-to-state foreign engagement, which can in part be explained by diplomatic symbolism and institutional inertia bound up in the history of GATT and the WTO. In spite of the history, tradition, and institutional structures, the present day practice of whole-state sanctions may need to be reexamined in light of the growing terrorism from non-state actors. Terrorism has changed in character and its sources of funding have altered, too. Such realities may encourage the possibility of finding new uses and limits to Article XXI.

In the second section of this Paper an alternative method of applying sanctions is offered, a method that attempts to address the shortcomings of present sanctions while retaining the forcefulness that makes sanctions a practical weapon in international disputes. Regional sanctions that pay little heed to national borders, but rather focus on specific areas or regions are offered as a practical alternative solution. Possible objections to regional sanctions are presented, as well, at the end of the Paper.

II. SANCTIONS PAST AND PRESENT

A. Background to GATT Article XXI

1. Drafting of Article XXI

The Allied powers at the end of the Second World War viewed growth in international commerce and economic prosperity as vehicles for a lasting peace. So when Allied victory in World War II seemed imminent, the Allies convened in Bretton Woods, New Hampshire and laid out the three pivotal institutions of modern trade liberalization designed to ensure world peace: the International Monetary Fund (IMF), the World Bank, and the GATT.⁸ The GATT became the

7. World Trade Organization, Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994 [hereinafter WTO Agreement].

8. Jim Chen, *Pax Mercatoria: Globalization as a Second Chance at "Peace for Our Time"*, 24 FORDHAM INT'L L.J. 217, 226 (2000).

primary global framework for which to assess trade liberalization, and thus the provisions of GATT took on a significance of their own.⁹

Article XXI is an original provision of the 1947 GATT that was drafted with much debate and conflicting ideas.¹⁰ The drafters struggled with finding a balance between two important interests: the right of states to freely protect themselves from security threats and the need to limit the use of a security exception to only in times of genuine security threats, which one drafter to the original GATT noted, “[w]e cannot make it too light, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.”¹¹

The security exception had to be addressed far more carefully than other issues for trade exceptions, such as protection of public morals, protection of human, animal, or plant life or health, and preservation of national treasures,¹² because “[n]ational security issues are obviously very sensitive and intimately connected with the safety, sovereignty and existence of States.”¹³ The fact that the GATT drafters understood this is illustrated by their revision of Article XXI from the original intention of using the more restrictive chapeau of Article XX¹⁴ for both Article XX and Article XXI.¹⁵ Thus, the drafting history indicates that the application of the Article XXI security exception was not meant to be judged with the same level of scrutiny as other exceptions in the GATT framework, but at the very strictest, a scrutiny that gives more deference to the states applying the security exception than would normally be given for other GATT exceptions.

9. For a history on the GATT, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* (MIT Press, 1989); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

10. See Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of the Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 421–22 (2001).

11. Preparatory Committee of the U.N. Conference on Trade and Employment, July 24, 1947, *Verbatim Report*, at 20–21, U.N. Doc. E/PC/T/A/PV/33 (1947).

12. This is a partial list of “General Exceptions” found in GATT. GATT, *supra* note 5, at art. 20.

13. Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 372 (2003).

14. The chapeau of Article XX states: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .” Cf. GATT, *supra* note 5, at art. 21 (qualifying terms such as “arbitrary” and “unjustifiable discrimination” are not explicitly mentioned in Article XXI).

15. Cann, *supra* note 10, at 422.

2. Past Usage of Article XXI

Usage of Article XXI under the pre-WTO GATT framework gave rise to the unresolved question of whether or not GATT Contracting Parties had a right to invoke Article XXI without subject to any review by some sort of judicial panel.¹⁶ This was complicated by the language of Article XXI, which seems to give more deference to invoking States than other GATT exceptions. This deferential feature of the Article's wording coupled with the fact that before the establishment of the WTO, GATT existed as an *ad hoc* unofficial "institution" composed of agreements with no permanent or central organization,¹⁷ significantly reduced the odds of probability that usage of Article XXI would ever be subject to outside review.

The first attempted usage of Article XXI as a justification for a sanction was by the United States against Czechoslovakia.¹⁸ Czechoslovakia brought attention to the U.S. sanction in 1949, claiming that the United States invoked Article XXI in an overly broad way, "because the narrow reference in the text to war materials had been construed by the United States Government to cover a wide range of goods which could never be so regarded."¹⁹ Paving the way for outside review on the Article XXI application, the U.S. conceded that "if at any time it were thought that a decision had been based on false premises, the interested party could have recourse to the appeal board which was instituted for that purpose."²⁰ Upon review, the Contracting Parties rejected Czechoslovakia's claim on substantive grounds, but, significantly, the Contracting Parties did not decline jurisdiction over the case.²¹

After the U.S.-Czechoslovakia dispute, various nations invoked Article XXI as a defense for sanctions six more times prior to the establishment of the

16. Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1310-11 (2003).

17. GATT became the *de facto* unofficial organization responsible for overseeing GATT compliance when the U.S. failed to ratify the proposed International Trade Organization (ITO) as the official organization empowered to manage trade liberalization. Consequently, GATT operated more on consensus between Contracting Parties and less on centralized decision-making made by a legally empowered organization. See JOHN H. JACKSON et al., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 293-301 (3d ed. 1995).

18. *Summary Record of the Twenty-Second Meeting*, GATT/CP.3/SR22, B.I.S.D. II/28 (June 8, 1949).

19. *Id.*

20. *Id.*

21. Hannes L. Schloemann & Stefan Ohlhoff, *Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 432 (1999). For background facts on the U.S.-Czechoslovakia dispute, see Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 333 (1998).

WTO.²² Of these cases, three set important principles in place for understanding the scope of Article XXI. In the 1961 dispute between Ghana and Portugal, where Ghana defended its sanctions, Ghana expanded the usage of the national security application by using it to cover potential as well as actual danger.²³ A little over two decades later a dispute erupted between the European Community (EC) and Argentina, from which the Contracting Parties adopted the decision that a nation invoking Article XXI had to notify other Contracting Parties "to the fullest extent possible."²⁴ In 1985, the United States invoked Article XXI to justify its sanctions against Nicaragua at the time.²⁵ The U.S. did not permit the Contracting Parties to make a substantive review of its actions, asserting that Article XXI was self-defining for individual States.²⁶

3. Creation of WTO and Its Usage

The WTO was proposed to at least in part help clarify some of the ambiguity of the former GATT framework. The WTO accomplishes this by requiring Member Nations to implicitly surrender some sovereignty in order to join the WTO and take advantage of its benefits.²⁷ Another feature of WTO that makes it much stronger than its forebear is the mandatory and independent dispute resolution system.²⁸ The WTO dispute settlement system was actually urged by the United States, more than any other Uruguay Round participant, so that a prospective defendant would not experience the same level of frustration as defendants did under the old GATT system.²⁹

The formation of the WTO has been called a watershed moment in modern politics and economics in that it has constitutionalized customs of international trade law and consequently strengthened the role free trade has in international

22. Note, *Be Careful What You Wish for: U.S. Politics and the Future of the National Security Exception to the GATT*, 31 GEO. WASH. J. INT'L L. & ECON. 97, 101 (1997).

23. See GATT Council, *Summary Record of the Twelfth Session*, GATT/SR.19/12 [hereinafter Summary Record] (Dec. 12, 1961).

24. Report of the Panel, *Decisions Concerning Article XXI of the General Agreement*, ¶1 (Nov. 30, 1982), GATT B.I.S.D. (20th Supp.), at 23 (1983).

25. Exec. Order No. 12,513, 3 C.F.R. 342 (1986), reprinted in *United States—TRADE MEASURES AFFECTING NICARAGUA: COMMUNICATION FROM THE UNITED STATES*, GATT/L/5803, at 2 (May 29, 1985).

26. See GATT Council, *Minutes of Meeting held July 17–19, 1985*, GATT/C/M/191, at 41 (Sept. 11, 1985).

27. Lindsay, *supra* note 16, at 1298.

28. *Id.* at 1303.

29. John H. Jackson, *Helm-Burton, the U.S., and the WTO*, ASIL INSIGHTS, March 1997, available at <http://www.asil.org/insights/insight7/htm> (last visited Sep. 26, 2006).

relations.³⁰ Indeed, in just a few years after the establishment of the WTO, international trade law rapidly has evolved into a stable, mature, and almost predictable niche within the discipline of law itself. This is largely due to the massive volume of cases that the WTO dispute settlement system has handled since 1995; processing over 11,000 pages of reports total.³¹ It is no wonder then that the WTO dispute settlement system has become known as “the busiest international system for resolving international disputes in the history of the world.”³² Even so, an Article XXI case has not been brought to the WTO panel and decided on yet.

Two significant Article XXI sanctions have been challenged, though, since the birth of the WTO framework. In the controversy over the Helms-Burton Act,³³ the U.S. went beyond mere trade sanctions against Cuba, but also opened up American courts to civil lawsuits against any companies from third-party countries for “trafficking” in Cuban property once owned by Americans. American plaintiffs can sue for up to three times the value of the property. Moreover, the Helms-Burton Act prohibits the officers, controlling shareholders, and even the families of such who were found “trafficking” in formerly American-owned property from visiting the United States.³⁴ The E.U., Canada, and Mexico threatened to challenge Helms-Burton in a WTO panel; and the U.S. defended the legislation on Article XXI grounds, even suggesting that a WTO panel’s jurisdiction would not be recognized.³⁵ In the end, a political solution was worked out between the United States and the E.U. in order to avoid a WTO panel ruling.³⁶ Thus, the Helms-Burton controversy may not be very useful in shedding light on how to interpret Article XXI, but it does illustrate the reluctance of nations to actually go through with a WTO panel decision on Article XXI issues. This may largely stem from a desire of States

30. John H. Jackson, *Introduction: Reflections on International Economic Law*, 17 U.P.A.J. INT’L. L. 17, 23 (1996).

31. James Bacchus, *Groping Toward Grotius: The WTO and the International Rule of Law*, 44 HARV. INT’L L.J. 533, 540 (2003). A more recent count records that there have been a total of 345 disputes brought before the WTO. WTO, *Chronological List of Disputes Cases*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2005 (last visited Sept. 28, 2006); and of those, 73 Appellate Body Reports from 1996 to 2005. WTO, *Dispute Settlement: Statistics*, available at http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm (last visited Sept. 27, 2006).

32. Bacchus, *supra* note 31, at 540.

33. See generally The Cuban Liberty and Democratic Solidarity Act (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021–91. (1996).

34. *Id.*

35. Lindsay, *supra* note 16, at 1305–06.

36. *Id.* at 1307.

to maintain control over their own security-influenced trade policy rather than leaving such decisions up to an international third party.³⁷

The second significant Article XXI dispute thus far in the WTO era is a trade conflict between Nicaragua and Colombia.³⁸ Nicaragua imposed sanctions on Colombia and defended the sanctions by invoking Article XXI and arguing that a WTO panel does not have jurisdiction over Article XXI sanctions. The E.U., mindful of Helms-Burton, supported Colombia's right to appeal to the WTO for a panel review. Eventually, a deal was worked out in which the Dispute Settlement Body (DSB) of the WTO agreed to set up a panel, but the Chairman of the DSB consulted with Nicaragua and Colombia, thereby avoiding the establishment of a panel.³⁹ This dispute also shows reluctance for rushing an Article XXI dispute to a panel. Consequently, no Article XXI dispute has been resolved by a WTO panel. This means that the hypothetical question of whether the panel will adopt absolute deference to the states or varying degrees short of this continues to divide scholars.⁴⁰ In a larger sense, no boundaries yet have been put on Article XXI limiting its usage in any way. This may be both a curse and a blessing in that states have neither a model nor guideline to follow when issuing sanctions; yet precisely because of this lack of clarity, states are free to do as they wish. The current lack of consensus of Article XXI makes for interesting analysis in light of evolving and growing national security concerns that haunt the modern geopolitical landscape.

37. Lindsay speculates that States have an incentive of maintaining a blurry concept of Article XXI so that they may use the provision whenever they feel they need it. For this reason, WTO members are not "rushing to embrace the new legalism for issues of national-security." *Id.* at 1308.

38. See WTO, *Nicaragua-Measures Affecting Imports from Honduras and Colombia*, WT/DS188/2 (Mar. 28, 2000).

39. Akande & Williams, *supra* note 13, at 377.

40. For a sampling of scholarly opinion, see Antonio F. Perez, *To Judge Between the Nations: Post Cold War Transformations in National Security and Separation of Powers—Beating Nuclear Swords into Plowshares in an Imperfectly Competitive World*, 20 HASTINGS INT'L & COMP. L. REV. 331, 408–10 (1997) (presenting the view that because the WTO dispute settlement process intended to be more adjudicative than the pre-WTO GATT, the WTO ought to have more authority over substantive trade questions, including the security exception); Rene E. Browne, *Revisiting "National Security" in an Interdependent World: The GATT Article XII Defense After Helms-Burton*, 86 GEO. L.J. 405, 432 (1997), (asserting that national sovereignty is becoming an outdated concept facing competing values, which means national security concerns must be subjected to a WTO panel that balances such concerns against the value placed in interdependent trade); David A. Baldwin, *Reconciling Political Sanctions with Globalization and Free Trade: Prolegomena to Thinking about Economic Sanctions and Free Trade*, 4 CHI. J. INT'L L. 271, 280–81 (2003) (giving the perspective that nations ought to have authority to impose security-related trade sanctions because issues other than trade are involved and the global political stability from sanctions eventually leads to more free trade); see Lindsay, *supra* note 16, at 1310 (offers a compromise solution of deliberately leaving the question of deference unanswered so as to allow and encourage disputing parties to politically negotiate through the sensitive terrain of national security issues).

B. Present Sanctions in the War on Terrorism

1. Recent Counterterrorism Actions

One of the most visible national security concerns in recent years is terrorism. Although difficult to track statistically, not least of all because of a difficulty in defining the criteria, terrorism arguably reached relative highs in terms of total number of international terrorist attacks between the years 1999 and 2001.⁴¹ Undoubtedly, such numbers have fueled the increased concern expressed by governments, the media, and the public over terrorism.

The magnitude of the threat from terrorism, indeed, can be anecdotally measured by the increasing number of counter-terrorism commissions and official measures being created by primarily economic multi-national organizations throughout various parts of the world. The Asia-Pacific Economic Cooperation (APEC), for example, established its Counter Terrorism Task Force (CTTF) in February 2003, which, among other programs, oversees the Secure Trade in the APEC Region (STAR) program.⁴² The European Union adopted the Treaty on European Union in 2002, which includes in the Provisions on Police and Judicial Cooperation in Criminal Matters an article that specifically identifies terrorism as a matter that needs policing.⁴³ In the aftermath of the March 11, 2004 terrorist attacks in Madrid, the E.U. set up a pan-European anti-terrorism campaign that created uniform arrest warrants and database entries to track and mitigate potential terrorist threats.⁴⁴ In Southeast Asia, the Association of Southeast Asian Nations (ASEAN) adopted the Declaration on Joint Action to Counter Terrorism in November 2001.⁴⁵

The swelling concern of terrorism by multi-national organizations more experienced in trade and economic issues is consistent with the increasing attention that political institutions have given to terrorism issues in recent years.

41. U.S. Dept. of State, *Patterns of Global Terrorism 2003*, Appendix G (released June 22, 2004), available at <http://www.state.gov/s/ct/rls/crt/2003> (follow "Report (pdf format)" hyperlink; follow "Appendix G" hyperlink) (last visited Mar. 7, 2006).

42. Asia Pacific Economic Cooperation, *Counter Terrorism* (2006), available at http://www.apecsec.org.sg/apec/apec_groups/som_special_task_groups/counter_terrorism.html (last visited Sept. 26, 2006).

43. *Consolidated Version of the Treaty on European Union*, 29 OFFICIAL J. EUR. COMMUNITIES (2002).

44. Thomas Fuller, *European Union Agrees on Plan to Coordinate Anti-terror Effort*, N.Y. TIMES, Mar. 26, 2004 at A9. For a slightly skeptical perspective, however, on the efficacy of E.U. law enforcement integration, see Eric J. Lobsinger, *Terrorism and Counter-Terrorism: A Window on EU Integration*, 1 HANSE L. REV. 127, 236-41 (2005), available at <http://www.hanselawreview.org> (follow "Vol.1 No.2" hyperlink; then follow "Article" hyperlink) (last visited Sept. 26, 2006).

45. Ass'n of Southeast Asian Nations [ASEAN], *ASEAN Efforts to Counter Terrorism* (Nov. 2001), available at <http://www.aseansec.org/14396.htm> (last visited Mar. 7, 2006).

For instance, the member nations of the regionally based Organization of American States (OAS) signed the Inter-American Convention Against Terrorism in June 2002.⁴⁶ In the weeks following September 11, 2001, the Security Council of the United Nations adopted Resolution 1373 to condemn the September 11th attacks and to establish the Counter Terrorism Committee, which comprises of all fifteen Security Council members.⁴⁷ In the U.S., President George W. Bush issued sweeping economic sanctions as U.S. policy in the immediate aftermath of the September 11th attacks.⁴⁸ Moreover, government leaders from diverse nations have convened to discuss how ideological terrorism threatens to completely replace current notions of government with systematic governance that imposes the ideology of terrorist organizations.⁴⁹ Aside from political reasons, an economic rationale as to why governments have taken a proactive interest in blotting out terrorism is that terrorism is seen as a threat to trade liberalization—safe trade is an important precondition of free trade.⁵⁰

The dual phenomena of terrorism and expanding globalized markets have become linked as a way for the world powers to define global political and economic policy. The United States has taken up a foreign policy of expanding free markets and free trade as a tool to counteract the appeal of terrorism in impoverished parts of the world.⁵¹ This policy of using trade as a counter-terrorism measure under the faith that doing so will reduce poor economic conditions in developing countries favorable to terrorism has been championed by a wide range of commentators.⁵²

A counter-terrorism strategy that strikes at the financial funding of terrorism, however, has gained more traction recently as an immediate response

46. Inter-American Convention Against Terrorism, June 3, 2002, Clementine Olivier, Human Rights Law and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? USAG/RES. 1840 (XXXII-0/02) (June 3, 2002).

47. S.C. Res. 1373, U.N. Doc. S/RES/ 1373 (Sept. 28, 2001).

48. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

49. Militant Islamists, for example, have openly advocated the creation of a pan-Islamic state across South and Southeast Asia. In multinational response to this, see Shawn Donnan, *Bali Hosts Terrorism Debate while Indonesia Shies Away from Confronting Suspects*, FIN. TIMES (Asia ed.), Feb. 4, 2004 at 2.

50. Michel Henri Bouchet, *The Impact of Geopolitical Turmoil on Country Risk and Global Investment Strategy*, in *TERRORISM AND THE INT'L BUS. ENV.: THE SEC.-BUS. NEXUS*, 92–94 (Gabrielle G.S. Suder, ed., 2004).

51. See President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited Sept. 28, 2006).

52. Compare John Norton Moore, *Solving the War Puzzle*, 97 AM. J. INT'L L. 282, 288 (2003), with Christopher Preble, *Free Trade: a Potent Weapon Against Terror*, AUSTRALIAN, Oct. 20, 2003 (giving a libertarian perspective) and Daniel T. Griswold, *Free Trade Tills the Soil of Democracy*, DETROIT NEWS, July 30, 2003, and Jeffery D. Sachs, *Democrats Should Back Free Trade*, WALL ST. J., Dec. 4, 2001 (giving a neoconservative perspective).

to terrorism. The Financial Action Task Force (FATF), an inter-governmental body that attempts to police against money laundering and terrorist financing, has advocated methods to improve information exchange between countries on terrorist funding.⁵³ The U.S. has also more aggressively taken official action to pursue the financing of terrorism.⁵⁴ However, the desire to locate and disrupt sources of financing for terrorists, although attracting more salience and attention today, has been a counter-terrorism strategy for at least several decades now.⁵⁵ Indeed, countries have, since decades ago, engaged in trade and economic sanctions against nations which have had governments suspected of sponsoring terrorism.

2. Traditional Whole-Nation Sanctions

At least until very recently, financial disruption of terrorism networks has almost exclusively meant penalizing government sponsors of terrorism, usually by targeting whole nations with trade or foreign investment restrictions. Famous examples of sanctions levied against an entire nation for suspected terrorism links by the government are the International Emergency Economic Powers Act (IEEPA)⁵⁶ and the Export Administration Act (EAA).⁵⁷ Both U.S. statutes give the President broad powers to impose trade sanctions against hostile nations. The IEEA has been used against South Africa in the 1980s, Iraq in the 1990s, Haiti, Burma, Sudan, Serbia, Montenegro, and the Federal Republic of Yugoslavia.⁵⁸ The U.S. also leveled sanctions against Iran during the hostage crisis, the Soviet Union after its invasion of Afghanistan, and Poland after martial law was declared there for a time.⁵⁹ It can be said that some of the aforementioned sanctions were motivated more by human rights concerns rather than terrorism or national security concerns, while other sanctions were probably motivated by a mixture of both. The relatively

53. E.g., Fin. Action Task Force, *Forty Recommendations on Money Laundering*, (June 20, 2003), available at <http://www.fatf-gafi.org> (follow the "40 Recs" hyperlink) [hereinafter FATF]. See also FATF, *Nine Special Recommendations on Terrorist Financing*, (Oct. 22, 2004) available at <http://www.fatf-gafi.org> (follow "9 Special Recs" hyperlink). Andrew Parker, *Move to Boost Crackdown on Terrorist Finance*, FIN. TIMES (Asia ed.), Feb. 28/29, 2004, at 5 (providing an account of the geopolitical climate surrounding FATF's actions).

54. See *supra* note 48.

55. LORETTA NAPOLEONI, MODERN JIHAD: TRACING THE DOLLARS BEHIND THE TERROR NETWORKS, 22 (2003) (describing the economic trade policies the United States pursued during the Cold War, particularly in response to Marxist guerilla fighters/terrorists in El Salvador).

56. 50 U.S.C. § 1702 (2004).

57. 50 U.S.C. § 2401 (2004).

58. Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'L ECON. L. 133, 143–44 (2002).

59. *Id.*

recently passed Clean Diamond Trade Act,⁶⁰ which initially faced opposition from President George W. Bush on the grounds that the Act allegedly violates GATT,⁶¹ mixes a concern for human rights conditions in Africa with a desire to end militarization in certain African countries like Sierra Leone and Liberia.⁶² It has been suggested that many of the diamonds affected by the Clean Diamond Trade Act are used to funnel funds to the terrorist organization al-Qaeda.⁶³

Regardless of whether sanctions are imposed largely because of explicit national security concerns, human rights concerns, or a blurring of both—which may increasingly be the case as gross violations of human rights are becoming understood as threats to international peace and security⁶⁴—the traditional model of imposing sanctions, as illustrated by the examples above, is to use sanctions to penalize an entire nation for the alleged crimes or abuse of its government. Almost all international disputes between national governments follow this traditional approach of using whole-nation sanctions. Indeed, it is difficult to imagine another common approach to resolve international disputes, other than the resort to military action. Illustrative of the prevalent usage of sanctions, it is impossible to even conceive of United States foreign policy without the existence of whole-nation sanctions.⁶⁵

3. Diplomacy, Politics, and Institutions

A political justification of why whole-nation sanctions are conventional and normative is that most global agreements concerning trade, security, and human rights have government signatories, not private entities or individuals as signatories. Thus, governments are parties in disputes in all but a handful of cases where private individuals are directly allowed to bring their complaints.⁶⁶

60. 19 U.S.C.S. § 3901 (2004).

61. Cleveland, *supra* note 58, at 134.

62. Questions surrounding the legality of the Act under the GATT framework were waived by the WTO. See WTO General Council, *Proposed Agenda*, Item 6, WT/GC/W498 (May 13, 2003).

63. See Timothy W. Docking, *Terrorism's Africa Link*, CHRISTIAN SCIENCE MONITOR, Nov. 14, 2001 at 9. See U.S. Sen. Patrick Leahy, Address on the Senate Floor (Apr. 9, 2003), available at <http://www.leahy.senate.gov/press/200304/040903e.html> (last visited Sept. 29, 2006).

64. Hoe Lim, *Trade and Human Rights: What's at Issue?*, 35 J. WORLD TRADE 275, 286–87 (2001). The conceptual blurring of national security and human rights has strongly influenced the foreign policy of President Bush's administration, see Guy Dinmore, 'Fear Societies' the Target of New Administration, FIN. TIMES. (Asia ed.), Jan. 21, 2005, at 2.

65. Raj Bhala, *MRS. WATU: Seven Steps to Trade Sanctions Analysis*, 20 MICH. J. INT'L L. 565, 566–67 (1999).

66. Private individuals may bring a cause of action under the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. Private investors may bring complaints against foreign governments through the International Centre for Settlement of International Disputes (ICSID) depending on

The GATT is no exception to this general rule. The GATT exclusively treats member states as parties to the GATT framework, which means only member states may participate in WTO panel and Appellate Body proceedings. This feature has opened the WTO GATT dispute settlement process to criticism from those who feel that non-governmental organizations (NGOs) ought to play a larger role in dispute settlement by being able to file *amicus* briefs in panel and Appellate Body hearings.⁶⁷ The WTO was formed exclusively by states, however, and it is precisely from the formal entry into the WTO by 149 states⁶⁸ that gives the WTO a certain image of legitimacy. Moreover, if states enter the WTO, naturally states have an interest in maintaining control over hearings. Furthermore, it may be difficult to overstate the simple institutional inertia that exists in the WTO dispute settlement structure, which would make the introduction of non-state parties in the process rather unlikely for the near future.⁶⁹

Another reason why the WTO remains exclusively a dispute settlement body between member states is that this makes communication and settlement easier for nations. Member states are more likely to be aware of one another's needs or areas of compromise, whereas private parties may be quite unpredictable as to what they are expecting or would accept for compensation. Predictability is arguably a rather significant benefit for national security related trade sanctions, which often touch on sensitive topics such as political fear, nationalism, and genuine concerns over safety. Undoubtedly, with the high political stakes involved in an Article XXI sanction, predictability is a very valuable asset for a diplomatic solution. Should private parties be able to bring complaints challenging the legitimacy of an Article XXI sanction, however, the private parties stand a greater chance to act incalculably.

It also bears noting that national security related sanctions are not infrequently coordinated or planned with other nations. As in the African conflict diamond regulation and the sanctions in Iraq through the 1990s, many parts of the world join in sanctions where there exists a shared threat or a shared symbol of a threat. The U.N. can at times serve as a guide to encourage

the relationship with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. See WTO, *Agreement on Trade Related Aspects of Intellectual Property Rights*, Annex C (Apr. 15, 1994).

67. See Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 *FORDHAM INT'L L.J.* 173 (2000); Daniel D. Bradlow, *The Issues in the New Millennium: "Times are a-Changin'": Some Preliminary Thoughts on Developing Countries, NGOs, and the Reform of the WTO*, 33 *GEO. WASH. INT'L L. REV.* 503 (2001).

68. WTO, Homepage, *What is the WTO?* available at <http://www.wto.org> (follow "The WTO" hyperlink; then follow "What is the WTO?" hyperlink) (last visited Sept. 28, 2006).

69. Joseph Weiler, WTO Panel Member, Remarks at Kyushu University, Graduate School of Law (Mar. 22, 2004).

nations to share in the fight against terrorism by suggesting multilateral action.⁷⁰ These sort of shared sanctions operate best amongst parties that know one another. Additionally, since the goal of such sanctions is usually to pressure the sanctioned nation to abandon dangerous weapons programs, stop human rights abuses, or to crack down on militants and/or terrorists within national borders, it does seem most effective to place liability, by way of sanctions, against governments.

C. Problems with the Present Model

1. Humanitarian Concerns

Despite the long practice of nation states placing trade sanctions on one another, there exist several shortcomings of whole-nation sanctions in the current fight against terrorism. One objection to conventional sanctions, which may be applicable to all whole-nation sanctions and not just Article XXI measures, is that traditional sanctions tend to place hardship on those who are powerless instead of putting pressure on the intended targets.⁷¹ This can lead to severe humanitarian crises, a significant concern in its own right, but also a contributing problem in the spread of terrorist ideology. Whole-nation sanctions have the powerful ability to disrupt the economic development of the target country, thereby crippling a number of economic opportunities for people in the target country. This in turn may breed an environment of dissatisfaction and hostility, fodder for ideological extremism and terrorism.⁷² Thus, the long-term harmful effects on innocent populations—a virtual inevitability from whole-nation sanctions—need to be seriously weighed in order to avoid disastrous unintended consequences of not only the humanitarian kind but of the national security kind as well.

2. Internationalization and Global Regionalism of Terrorism

There are other significant shortcomings in continuing to understand GATT Article XXI within a nation-to-nation paradigm. The changing nature of terrorism may be antiquating the current dispute settlement process. State-sponsored terrorism has been steadily declining since the early 1990s. It has

70. *E.g.*, 2002/35 Human Rights and Terrorism, The Commission on Human Rights, April 22, 2002.

71. Don Henshaw, *Sanctions: Another Weapon of War*, CAMBRIDGE REP., Apr. 25, 2003, at A6 (illustrating that sanctions against Iraq did little to destabilize the regime of Saddam Hussein, but reportedly led to severe starvation and malnourishment of hundreds of thousands of people in Iraq).

72. Kevin J. Fandl, *Terrorism, Development & Trade: Winning the War on Terror Without the War*, 19 AM. U. INT'L L. REV. 587, 602–03 (2004).

been replaced with terrorism conducted by independent groups, usually very ideologically driven by violent religious extremism or nationalism.⁷³ Indeed, in the U.S. State Department's current list of Designated Foreign Terrorist Organizations, a list of thirty-seven organizations, and Other Terrorist Groups, a list of an additional forty groups, there is not a single organization that is directly or officially state-sponsored.⁷⁴ Although the list does include several groups that have varying degrees of informal support from government leaders, e.g., Hezbollah has received funding and aid from Iran,⁷⁵ the majority of the listed organizations operate more or less independently from any government

73. WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* 178-83 (1999).

74. The Designated Foreign Terrorist Organizations are: Abu Nidal Organization (ANO), Abu Sayyaf Group (ASG), Al-Aqsa Martyrs Brigade, Ansar al-Islam (AI), Armed Islamic Group (GIA), Asbat al-Ansar, Aum Shinrikyo (Aleph), Basque Fatherland and Liberty (ETA), Communist Party of the Philippines/New People's Army (CPP/NPA), Al-Gama'a al-Islamiyya (Islamic Group, IG), HAMAS (Islamic Resistance Movement), Harakat ul-Mujahidin (HUM), Hizballah (Party of God), Islamic Movement of Uzbekistan (IMU), Jaish-e-Mohammed (JEM), Jemaah Islamiya (JI), Al-Jihad (Egyptian Islamic Jihad, EIJ), Kahane Chai (Kach), Kongra-Gel (KKG, formerly Kurdistan Workers' Party, PKK, KADEK), Lashkar-e-Tayyiba (LT), Lashkar i Jhangvi (LJ), Liberation Tigers of Tamil Eelam (LTTE), Mujahedin-e Khalq Organization (MEK or MOK), National Liberation Army (ELN - Colombia), Palestinian Islamic Jihad (PIJ), Palestinian Liberation Front (PLF), Popular Front for the Liberation of Palestine (PFLP), Palestinian Front for the Liberation Front of Palestine-General Command (PFLP-GC), Al-Qaida, Real IRA (RIRA), Revolutionary Armed Forces of Colombia (FARC), Revolutionary Nuclei, Revolutionary Organization 17 November, Revolutionary People's Liberation Party/Front (DHKP/C) 135, Salafi st Group for Call and Combat (GSPC), Sendero Luminoso (Shining Path or SL), and United Self-Defense Forces/Group of Colombia (AUC). 2003 DEP'T ST. PATTERNS OF GLOBAL TERRORISM REP. app. B (released April 29, 2004), available at <http://www.state.gov/s/ct/rls/pgrtpt/2003/31711.htm> (last visited Mar. 26, 2005). The Other Terrorist Groups are: Al-Badr Mujahedin (al-Badr), Al-Ittihad al-Islami (AIAI), Alex Boncayao Brigade (ABB), Army for the Liberation of Rwanda (ALIR), Anti-Imperialist Territorial Nuclei (NTA), Cambodian Freedom Fighters (CFF), Communist Party of Nepal (Maoist)/United People's Front, Continuity Irish Republican Army (CIRA), Eastern Turkistan Islamic Movement (ETIM), First of October Antifascist Resistance Group (GRAPO), Great East Islamic Raiders-Front (IBDA-C), Harakat ul-Jihad-I-Islami (HUJI), Harakat ul-Jihad-I-Islami/Bangladesh (HUJI-B), Hizb-I-Islami Guldbuddin (HIG), Hizbul-Mujahedin (HM), Irish National Liberation Army (INLA), Irish Republican Army (IRA), Islamic Army of Aden (IAA), Islamic International Peacekeeping Brigade (IIPB), Jamiat ul-Mujahedin (JUM), Japanese Red Army (JRA), Kumpulan Mujahidin Malaysia (KMM), Libyan Islamic Fighting Group (LIFG), Lord's Resistance Army (LRA), Loyalist Volunteer Force (LVF), Maoist Communist Center of India (MCCI), Moroccan Islamic Combatant Group (GICM), New Red Brigades/Communist Combatant Party (BR/PCC), People Against Gangsterism and Drugs (PAGAD), Peoples War, Red Hand Defenders (RHD), Revolutionary Proletarian Initiative Nuclei (NIPR), Riyadus-Salikhin Reconnaissance and Sabotage Battalion of Chechen Martyrs (RSRSBCM), Sipah-I-Sahaba/Pakistan (SSP), Special Purpose Islamic Regiment (SPIR), The Tunisian Combatant Group (TCG), Tupac Amaru Revolutionary Movement (MRTA), Turkish Hizballah, Ulster Defense Association/Ulster Freedom Fighters (USA/UFF), and Ulster Defense Force (UVP). 2003 DEP'T ST. PATTERNS OF GLOBAL TERRORISM REP. app. C (released April 29, 2004), available at <http://www.state.gov/s/ct/rls/crt/2003/31759.htm> (last visited Feb. 22, 2006).

75. PATTERNS OF GLOBAL TERRORISM app. B, *supra* note 74.

authority or agenda, except where a terrorist organization's agenda and a government's agenda happen to be congruent. Even amongst the organizations that may have originated with formal state sponsorship, such as the PFLP in 1967 from the Palestinian Liberation Organization (PLO), these organizations are notorious for splitting in factions, as the PFLP-GC did in 1968 from the PFLP,⁷⁶ and thus tend to be unreliable to the formal state organs for carrying out state political goals under the leadership of state strategy. The extent of autonomy of non-state terrorist organizations is reflected in their ability to engage in state-like "plausible deniability" as well as hold diplomatic relations with formal states.⁷⁷

The weakening of state-sponsored terrorism is illustrated by the lack of terrorist activity of once highly involved countries such as Cuba, which at one point supported nearly all Latin American extremist movements and left-wing terrorism, and North Korea, responsible for a number of massive bombings against South Koreans in the 1980s.⁷⁸ Libya also has recently shown uneasiness in sponsoring terrorism. In the 1970s and 1980s one of the foremost sponsors of international terrorism—Colonel Khadafi even promoted his little "Green Book" as inspirational literature for terrorism—today Libya has jettisoned its pro-terrorism rhetoric and has even begun to cooperate with the West in revealing valuable information about its weapons programs.⁷⁹

What has replaced the state-sponsored terrorism, however, is far more dangerous, at least within the security and sanction framework that exists today. Names of organizations like al-Qaeda have now entered the common Western vocabulary, and Osama bin-Laden is possibly the world's most infamous person. Neither al-Qaeda nor bin-Laden, though, are really associated with any particular nation state; both are perceived by the West as nationally amorphous, which makes it all the more difficult for observers to fully grasp what kind of terrorist force threatens the world today.

One of the most difficult characteristics about non-state terrorism is the evasiveness of the perpetrators. Unlike nation states, international terrorist organizations typically do not control quantifiable territory complete with a capital city. Rather, the terrorists, even the leaders of terrorist organizations, move stealthily, always on the run. It is a bit like guerilla warfare, just more transnational. This kind of mystery fighting, where not even the identity of the

76. *Id.*

77. NAT'L INTELLIGENCE COUNCIL MAPPING THE GLOBAL FUTURE: REPORT OF THE NATIONAL INTELLIGENCE COUNCIL'S 2020 PROJECT 94–5 (Dec. 2004), *available at* http://www.dni.gov/nic/NIC_globaltrend2020_s4.html#trans (last visited Nov. 18, 2006).

78. LAQUEUR, *supra* note 73, at 180–81.

79. Rob Watson, *U.S. Displays 'Libyan Nuclear Secrets'*, BBC NEWS, Mar. 16, 2004, <http://news.bbc.co.uk/2/hi/americas/3514818.stm> (last visited Nov. 18, 2006).

terrorist leaders are known with certainty, disappointed Pakistani forces who thought they were on to one of al-Qaeda's top officers near the border of Afghanistan in March 2004, but ended up finding tunnels instead which were probably used for al-Qaeda's escape.⁸⁰ Among the al-Qaeda fighters left behind, a mix of nationalities was discovered, including Uzbeks, Chechens, Afghans, Arabs, and western Chinese Uighurs.⁸¹ The multi-national and multi-ethnic dimension of non-state terrorism, as a result of either an ideological appeal that spans across national borders, like pan-Arabism, or a universal appeal, such as an absolutist faith in a militant and expansionist Islam, can be much more dangerous than state-sponsored terrorism due to the vaster reach of territory with a terrorist presence and the deeper pool of potential recruits.⁸² The Taliban in Afghanistan, for example, recruited "jihadists" from all over the world.⁸³ In Indonesia today there exists terrorist training camps operated by local Islamic militants that serve the wider al-Qaeda network that attract hundreds of foreigners from Europe, Pakistan, Afghanistan and the Middle East.⁸⁴ Monitoring non-state terrorist organizations, such as al-Qaeda's expansive network, is rather difficult because of the lack of fixed capitals and fixed borders.

Pakistan has already been mentioned, but one may note that countries as far apart and different as Indonesia, Yemen, and possibly Thailand have experienced difficulties with al-Qaeda activities within their borders.⁸⁵ This true internationalization of terrorism has become an undeniably characteristic feature of the modern world. Indeed, current trends suggest that non-state actors, including terrorist organizations, will continue to assume a more prominent role in global affairs.⁸⁶ It is for this reason that the traditional approach of comprehending the world exclusively in terms of nation states is outdated, and perhaps dangerously so. Consequently, employing trade sanctions to fit within neat political boundaries in order to pressure parts of the world to comply with the international community may be irreconcilable with reality.

80. David Rohde & Carlotta Gall, *Tunnels Found in Pakistan Tied to Foreign Militants*, N.Y. TIMES, Mar. 22, 2004.

81. David Rohde & Carlotta Gall, *Seeking Top Qaeda Figure, Pakistanis Battle Militants*, N.Y. TIMES, Mar. 20, 2004.

82. LAQUEUR, *supra* note 73, at 238.

83. *Id.* at 239.

84. Donald Pearson, *Radical Islam in Indonesia and Its Potential Impact on International Islamic Terrorism*, 8, no.2 J. COUNTERTERRORISM & SEC. INT'L 16, 17 (2002).

85. See *Jemaah Islamiyah Document Reveals Planned Bombings in Indonesia*, STRAITS TIMES, Apr. 1, 2005; Mark Huband, *Yemeni Police Arrest Second Top al-Qaeda Terror Suspect*, FIN. TIMES (Asia ed.), Mar. 5, 2004, at 7; Amy Kazmin, *Muslim Militants Blamed for Thai Blasts*, FIN. TIMES (Asia ed.), Feb. 11, 2005, at 9.

86. Nat'l Intelligence Council, *supra* note 77.

The very manner in which terrorist groups operate today—spread thin over vast territory, located in numerous countries—makes whole-nation sanctions an inadequate weapon; akin to “trying to kill a mosquito with a wrecking ball.”⁸⁷ Indeed, there exists evidence that al-Qaeda deliberately accelerated the decentralization of its organization to counteract and stay ahead of U.N. sanctions placed on it and Afghanistan, thus allowing al-Qaeda to stay financially able of carrying out its objectives.⁸⁸

Imposing whole-nation sanctions on states that sponsor terrorism may be justified because sanctioned governments might actually be significantly weakened if the national economies falter from a sharp reduction in trade. The rationale for whole-state sanctions against governments that sponsor terrorism cannot be used, however, for non-governmental terrorist organizations. A faltering domestic economy most likely does not affect independent terrorist organizations in the same way sudden economic collapse can undermine the legitimacy of a government.⁸⁹ Moreover, the vast majority of the terrorist organizations on the U.S. State Department’s list receive independent sources of funding separate from where the majority of their activities take place; this is particularly true for the terrorist groups that focus their terrorist activities in and near Israel, such as Hamas, Hezbollah, and the PFLP-GC.⁹⁰ Naturally, a very spread-out organization that truly is multi-national and has an independently wealthy leader, such as al-Qaeda, is not nearly as vulnerable to sanctions imposed on individual nations as the targeted nations themselves. Consequently, there appears to be a strong correlation between self-reliance of a terrorist group and the level of impact whole-nation sanctions will have on the group.⁹¹

3. Financing of Terrorism

Whole-nation sanctions are perhaps their weakest in addressing the financing of non-state terrorism. Unlike state-sponsored terrorism which for its funding relies heavily on domestic tax revenue, which in turn is dependent on the state of the economy, non-state terrorism tends to operate financially in the margins of economic activity, or perhaps even completely outside the

87. Alan Einisman, *Ineffective at Its Best: Fighting Terrorism with Economic Sanctions*, 9 MINN. J. GLOBAL TRADE 299, 320 (2000).

88. Stephen Fidler, *Al-Qaeda Outsmarts Sanctions, Says UN: Decentralisation and Smaller Operations with Less Need for Funds Frustrate Counter-Measures*, FIN. TIMES (Asia ed.), Aug. 28, 2004, at 1.

89. Einisman, *supra* note 87, at 300.

90. PATTERNS OF GLOBAL TERRORISM app. B, *supra* note 74.

91. Einisman, *supra* note 87, at 309.

mainstream economy.⁹² Consequently, the financial support of non-state terrorism is affected far less by whole-state sanctions than on state-sponsored terrorism.

Increasing evidence shows the extent to which terrorist organizations, particularly non-state organizations, receive funding through the illicit drug trade. In January 2002, the U.S. government for the first time collected proof that Hezbollah and terrorist groups in Yemen and Lebanon were directly receiving proceeds from the sale of methamphetamine in Chicago, Detroit, and other U.S. cities.⁹³ Of course, the linkage between the illicit drug trade and terrorist groups in Latin America has been well understood for some time by intelligence experts and scholars. It has been known since the 1980s, for instance, that the terrorist-sponsoring states of Cuba and Nicaragua have supported terrorist groups with illicit drug trafficking.⁹⁴ The non-state terrorist groups in Colombia, especially the FARC, may be considered the quintessential narco-terrorists, it being one of the first and largest narco-terrorist organizations.⁹⁵ FARC's status as a narco-terrorist organization is reflected in the lack of division between its revolutionary interests against Colombia's government, which it supports by terrorism, and its profiteering interests, which it supports from the cocaine trade, assuming there exists a division. Perhaps one of FARC's slogans is very telling: "Coca and Liberty . . . Long Live the Revolutionary Struggle."⁹⁶

Within militant Islamic terrorism, perhaps no organization contributed to the illicit drug trade more than the Taliban in Afghanistan. Although the Taliban long officially forbade the consumption of opium and similar drugs for religious reasons, and punished severely those who used drugs, the production of opium in Afghanistan was actually encouraged. As a result, before the fall of the Taliban, Afghanistan was one of the world's main centers of opium production.⁹⁷ Indeed, the U.S. Drug Enforcement Agency (DEA) has suggested that it is highly likely that Osama bin-Laden personally facilitated the heroin trade from Afghanistan to finance terrorist activities.⁹⁸

The illicit drug trade may not appear to have much relevance for WTO governance (after all, drug trafficking does not enjoy GATT concessions), but

92. M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 88 (2002).

93. Don Barnard, *Narco-Terrorism Realities: The Connection Between Drugs and Terror*, 9, no. 1 J. COUNTERTERRORISM & SEC. INT'L 31 (2003).

94. *Id.* at 32.

95. NAPOLEONI, *supra* note 55, at 39–40.

96. LAQUEUR, *supra* note 73, at 189.

97. *Id.* at 211–12.

98. Barnard, *supra* note 93, at 32.

the illicit drug trade does not exist in a vacuum; it exists amongst legal trade. The overwhelming majority of illicit drugs that are shipped to the U.S. are co-mingled with legally imported goods.⁹⁹ The innocuous kitchen ingredient honey, for example, is a favorite export/import good as a conduit for the illegal trafficking of drugs, arms, electronic items, etc.¹⁰⁰ Due to terrorist connections to certain sectors of the honey trade, such as Osama bin-Laden's control of Yemeni honey companies and Islamic Jihad's use of honey shops to raise funds, terrorist organizations receive revenue from a legal source as well as a cover for smuggling.¹⁰¹ Thus, it can be said that terrorists are using the legitimate free market, largely governed by the WTO, to engage in the illicit drug trade in order to fund terrorism.

Whole-nation sanctions, however, cannot address this problem very effectively because such sanctions are too indiscriminate, affecting the vast majority of trade in goods that are not co-mingled with illicit drugs. Not only do such broad sanctions deter trade liberalization in legitimate goods, and thus run counter to the objective of GATT and the WTO, but overly broad sanctions fail to isolate and identify the precise nature and export and import routes of illicit goods. From a law enforcement and investigative perspective, the whole-state sanction approach should raise some questions on how effectively the sanctions aid counter-terrorism agencies in tracing the financial sources of terrorism. Rather than using sanction tactics that were developed to fight the kind of terrorism that was prevalent two decades ago, counter-terrorism efforts today must adapt to the advantages that globalization has given to the financing of non-state terrorism.¹⁰²

One of the ways in which globalization has helped the financing of terrorism is by providing a globally expansive reach for businesses and NGOs or non-profit groups that serve as fronts for terrorist organizations. In the United States, for example, President George W. Bush soon after September 11th announced the closure of three entities in the U.S. that had ties with Hamas: the Holy Land Foundation, Beit-al Mal Bank, and Al Aqsa Islamic Bank.¹⁰³ The Holy Land Foundation, purportedly a charity, raised \$13 million

99. *Id.* at 33.

100. NAPOLEONI, *supra* note 55, at 158–59.

101. *Id.*

102. Willy Deridder, Executive Director of Interpol, Remarks at the 16th Annual Interpol Symposium on Terrorism (Oct. 22–23, 2001) (transcript available at <http://www.interpol.int/Public/ICPO/speeches/20011022b.asp>) (last visited Mar. 8, 2006).

103. Press Release, United States Department of Treasury, Remarks by John B. Taylor, Under Secretary of the Treasury on the Financial Fight Against Terror (Dec. 4, 2001), available at <http://www.ustreas.gov/press/releases/po840.htm> (last visited Feb. 22, 2006).

for Hamas in one year.¹⁰⁴ Beit el-Mal Bank and Al Aqsa Islamic Bank engaged in directing business and in investing \$25 million for Hamas.¹⁰⁵ Indeed, the United States' post-September 11th actions to more closely monitor financial information for terrorism links highlights the potential significant role that faux businesses and NGOs play in funding terrorism.¹⁰⁶ Stricter scrutiny on charitable funding since the September 11th attacks resulted in U.S. officials freezing over \$130 million in terrorist assets, with approximately \$75 million of the total suspected of having belonged to al-Qaeda or the Taliban in 2003.¹⁰⁷ In Canada, the government's anti-money laundering efforts have uncovered \$35 million in suspected terrorist financing; \$22 million was uncovered in the 2002-2003 fiscal year.¹⁰⁸ The periodic freezing of assets of individual groups worth millions of dollars, however, does not even begin to address the overall global network of terrorist financing, which has been estimated to be worth \$1.5 trillion.¹⁰⁹

The free market financial characteristic of non-state terrorism is a natural by-product of market globalization.¹¹⁰ NGOs like the Holy Land Foundation possibly benefit the most from globalization because NGOs, as a result of globalization, have risen in prominence and numbers in recent years, demanding for a greater role in the development of international norms and law.¹¹¹ Within this growth, terrorist organizations have planted NGOs for the purposes of spreading propaganda for terrorist objectives, receiving official recognition from governments and international organizations, like the United Nations, for their humanitarian efforts, recruiting activists for terrorism, and collecting donations.¹¹² Globalization has particularly increased the exploitive advantages that charities and faux charities can receive from official recognition from the United Nations, which provides an aura of legitimacy, thereby making it easier

104. *Id.*

105. *Id.*

106. See generally *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

107. Douglas Farah, *Al Qaeda's Finances Ample, Say Probers; Worldwide Failure to Enforce Sanctions Cited*, WASH. POST, Dec. 14, 2003, at A1.

108. Jim Bronskill, *\$35M Funneled to Terror Groups; Amount exceeds 2002-03 Agency 29 cases probed this fiscal year*, TORONTO STAR, Mar. 29, 2004, at A16.

109. Napoleoni compares this figure as being twice the GNP of the United Kingdom and three times the size of the United States money supply; thus appropriately terming terrorist financing as the New Economy of Terror. NAPOLEONI *supra* note 55, at 198.

110. *Id.*

111. Stephan Hobe, *The Era of Globalization as a Challenge to International Law*, 40 DUQ. L. REV. 655, 659-60 (2002).

112. Donald Pearson, *Tracking Terrorists Through Open Sources*, 6, no. 1, J. COUNTERTERRORISM & SEC. INT'L 58 (1999).

for these organizations to solicit funds from international donors.¹¹³ International donors may play a critical role because the organizations themselves are typically located in areas of an impoverished population. The growing threat of terrorist front organizations passing off as legitimate NGOs is indeed listed as one of the nine modern terrorism-related dangers issued by the international FATF.¹¹⁴

The recent seizures of terrorist funding reflect a concerted and more cooperative effort between governments and international agencies in pursuing terrorist financing.¹¹⁵ Nonetheless, the practice of freezing assets suspected of funding terrorism and relying on governments from varying economic and social conditions to police and make bank records transparent is a daunting task that may not be sufficient in blocking the financing of terrorism.¹¹⁶ Indeed, the FATF has identified sanctions as a critical step in reducing terrorist funding and, consequently, the threat of terrorism.¹¹⁷ Therefore, it may behoove nations to increase the usage of trade sanctions in their arsenal of methods to combat terrorist financing, but by employing trade sanctions designed to adapt to the non-state nature of terrorist organizations today. Sanctions ought to mitigate as much as possible the negative economic consequences inflicted on innocent populations. This caution should be taken for humanitarian reasons as well as to avoid causing social conditions friendly to terrorist ideology.

The traditional model of whole-state sanctions is inadequate to handle the modern threat to international stability from non-state terrorism. Although possibly effective for state-sponsored terrorism, whole-state sanctions address neither the transnational character of modern terrorism, nor of terrorism's increasing integration in the globalized economy from which it finds international financing. Since many terrorist organizations today are not conveniently

113. *Id.*

114. See *Nine Special Recommendations on Terrorist Financing*, *supra* note 53, at no. 8.

115. U.N. SC Res. 1373 (2001) and the FATF's Special Recommendations on Terrorist Financing are the main sources of law and guidelines for international cooperation in combating terrorist financing. SUPPRESSING THE FINANCING OF TERRORISM: A HANDBOOK FOR LEGISLATIVE DRAFTING (Paul Gleason & Glenn Gottselig eds., 2003). To help coordinate international efforts to combat terrorist financing, the Egmont Group brings together financial intelligence units from 101 countries to share information. To facilitate U.S. efforts, the U.S. Treasury Department recently created an office designated specifically to coordinate the investigation of terrorist financing with other financial crimes. Press Release, U.S. Dep't of the Treasury, U.S. Treasury Department Announces New Executive Office for Terrorist Financing and Financial Crimes (Mar. 3, 2003).

116. See Jean-Marc Sorel, *Some Questions About the Definition of Terrorism and the Fight Against Its Financing*, 14 EUR. J. INT'L L. 365 (2003).

117. The FATF has given increased importance to the policing of economic activity for money that may fund terrorism. See Cherry Reynard, *FATF Expands Its Role on with New Standards*, INT'L MONEY MARKETING, Nov. 6, 2001, at 1.

located or funded within neat political borders, but rather exist as shadowy entities spanning across nations and even continents, it must logically follow that trade sanctions imposed on nations put very little pressure on these non-state terrorist organizations. Indeed, one may even conclude that the disruption in trade liberalization from whole-state sanctions is no longer a proportional sacrifice for what little, if any, security returns such whole-state sanctions produce in the attempt to combat non-state terrorism. Consequently, GATT Article XXI must not be read in a manner that limits the security exception to only whole-state sanctions. Regardless of what may have been the original intent and early practice of Article XXI, to continue to read it in the traditional light endangers the world from the threat of international non-state terrorism, a realistic and material threat to the modern, globalized world.

III. AN ALTERNATIVE APPROACH TO APPLYING TRADE SANCTIONS

A. Regional Trade Sanctions in Response to Non-State Terrorism

1. The Application of Regional Sanctions

An alternative means of imposing trade sanctions without the disadvantages of whole-nation sanctions is to make sanctions more precise and better focused. Region-specific sanctions to counter terrorism would cease to define sanctions in the terms of nation states, but would rather conceptualize sanctions as a means to punish and control the wealth of particular terrorist organizations without regard to national boundaries.

Trade sanctions of this sort would not necessarily be bound on an entire nation, but could be imposed just on a particular region within a nation—perhaps imposed on a sub-national level of government—that is suspected of harboring terrorists or exporting goods to fund terrorism. Such a sanction would leave the rest of the nation unaffected in international trade. Using Thailand as an example, certain provinces suspected of harboring terrorist activities¹¹⁸ could have sanctions imposed, but the rest of Thailand would be free to trade. Although sub-national, region-specific sanctions could easily be transnational if the sanctioned areas cross national borders. A place where this may be desirable in order to counteract porous borders, a well organized terrorist network, and a related drug trade operating freely across national borders is the area where Paraguay, Brazil, and Argentina all intersect.¹¹⁹ Imposing trade sanctions just on the region where the three countries' borders

118. Kazmin, *supra* note 85.

119. Timothy L. O'Brien, *South American Area is Cited as Haven of Terrorist Training*, N.Y. TIMES, Oct. 10, 2003, at A28.

touch in order to put pressure on the movement of trade goods in the area would allow the remaining areas of the three countries free to engage in normal trade relations.

Regional sanctions, at least in effect, already have been utilized by the E.U. against the U.S. In the E.U.'s threatened countermeasures against U.S. steel import limits, the E.U. threatened to place sanctions on very particular types of goods, which all seemed to be important exports for certain U.S. states.¹²⁰ Curiously, these U.S. states were important "swing states" for the 2004 U.S. general election. Of course there are differences between E.U. countermeasures against targeted goods and regional sanctions used to mitigate terrorism. Whereas E.U. countermeasures may be designed to affect certain influential localities in order to place pressure on the national government, regional sanctions would primarily exist to directly challenge terrorist strongholds without any intention of undermining the national government.

Far from attempting to undermine or place pressure on a national government, regional sanctions could essentially ignore national governments and apply pressure directly to terrorist-dominated regions (assuming the national government is distinct from the terrorist organizations). Unlike conventional sanctions, regional sanctions could bypass the national government of a nation altogether; enabling the imposition of sanctions, an inherently international measure, but lacking the government-to-government interaction, a traditional facet of international actions. Perhaps this bypassing of national governments coincides with the growing clout of international non-governmental entities, such as NGOs, multilateral companies, international agencies, and even independent, transnational terrorist groups, all at the expense of the power of national governments.¹²¹ The implication behind avoiding national governments in imposing sanctions is not that it is a call for a change in how to shape foreign policy, but rather an acknowledgment of how globalization has shifted the focus away from states to non-state actors.

120. Adrian Cox & Emily Schwartz, *EU Tariff Revenge Could Get Personal; Would Target Goods from States Crucial Politically to Bush*, CHI. SUN-TIMES, Mar. 24, 2002, at 58.

121. Maryann Cusimano Love, *Globalization, Ethics, and the War on Terrorism*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 66-67 (2002). The author makes this observation on globalization and the diminishing importance of nation states, especially concerning terrorism: "On September 11th, nonstate actors used non-military means to attack primarily noncombatant and non-government targets. The al Qaeda terrorist network, the presumed perpetrators, operate across sovereign borders with cells in an estimated fifty states. The suicide bombers, nineteen hijackers representing no state, were Saudis and Egyptians living in the United States, trained in Afghanistan, organized and financed in Germany, England, and Spain, with information and money sent internationally to them from companies, non-governmental organizations (NGOs), and individuals. Al Qaeda's financial network drew from diamond trade in Sierra Leone and the Afghan heroin trade, linking the terrorist network with global crimes and drug trafficking networks."

Key characteristics of regional sanctions are that they could narrowly limit the areas under sanction as much as possible and geographically pinpoint a terrorist region with the hope of restricting the movement of trade goods in that area. Regional sanctions would radically change the perception of how anti-terrorism sanctions ought to be conceptualized in an age where national borders are losing their significance not just with terrorism but with all matters of global economic and political issues. From a legally formalistic point of view, the suggestion of ignoring national boundaries in imposing trade sanctions may seem rather bold. After all, the very foundation of the WTO presumes states to be actors in nearly all decisions¹²² and for the rules of trade to be in accordance with GATT. Indeed, recourse against sanctions perceived in violation of GATT is only given to member states of the WTO, thus providing states exclusively the right to challenge trade sanctions.¹²³

2. Flexibility of Article XXI

The most relevant provision in GATT for trade sanctions imposed to combat terrorism is the national security exception, Article XXI. Regional trade sanctions as suggested in this Paper have not yet been enacted under the provisions of Article XXI. Article XXI has only been invoked so far when targets of the sanctions have been nation states, which is not surprising given the presumptions of the GATT/WTO framework. The plain language of Article XXI, however, does not seem to preclude member states from imposing sanctions on specified regions within the borders of other member states. Article XXI uses rather broad and permissive language, in contrast with the more restrictive chapeau of Article XX.¹²⁴ The history of the usage of Article XXI does not shed much light as to whether a new, targeted approach to sanctions would be permissible, except that Article XXI sanctions may be justified for potential as well as actual dangers.¹²⁵ Moreover, ambiguity on what Article XXI permits partly stems from the fact that a WTO panel has not yet had the opportunity to review an Article XXI case. The broad language of Article XXI and the lack of definitive decisions concerning the Article have led

122. For exceptions, *see supra* note 66.

123. Only WTO member states may petition for a WTO panel to review another member state's sanctions to decide the validity of the sanctions under GATT. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round (1994), *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Nov. 18, 2006) [hereinafter DSU].

124. *See* GATT art. 21, *supra* text accompanying note 14.

125. *See Summary Record, supra* note 23.

scholars to disagree about some arguably more fundamental questions on the proper scope of the Article.¹²⁶

Considering the room for varying opinions on the usage of Article XXI sanctions, it may be reasonable to conclude that in the interests of fighting terrorism, regional trade sanctions imposed on the sub-national level against a WTO member state are well within the real possibilities for employing Article XXI. Of course, this line of analysis maintains its relevance only if the WTO has a right to review and make decisions on Article XXI sanctions.¹²⁷ For purposes of examining more clearly the legal flexibility of Article XXI, naturally it must be assumed that the WTO does possess the authority to review Article XXI sanctions.¹²⁸

3. Sanctions and the Diamond Trade

In 2003, the WTO granted sanctions that in some respects appear targeted at the sub-national level by authorizing trade restrictions imposed on WTO members not participating in the Kimberley Certification Scheme, a procedure that attempts to deter the sale of "conflict diamonds."¹²⁹ By issuing certification for diamonds that are mined with certain minimum standards, Kimberly Certification essentially enforces a source of origin scheme in which the particular mine the diamond is from is the relevant factor, with the objective of preventing as much as possible the sale of diamonds that fund militias and even terrorist organizations such as al-Qaeda.¹³⁰ The WTO-authorized waiver for accommodation of the Kimberley Certification Scheme is not, strictly speaking, however, a kind of regional sanction that is suggested by this Paper, since the WTO waiver authorizes sanctions on diamonds by Kimberley participants (that are member states) imposed on states that are not Kimberley participants. The WTO waiver, nonetheless, requires that trade in diamonds between Kimberley participants must be limited to non-conflict diamonds; this in effect threatens

126. See generally *supra* note 40.

127. The academic debate on whether an Article XXI sanction is reviewable by a WTO panel has produced a number of differing views. *Id.*

128. Should the WTO at some point actually decide that it has no authority to review Article XXI sanctions, naturally any further speculation on the legal limits of Article XXI, including this Paper's examination of targeted sanctions, would be moot, since Article XXI would then essentially serve as a limitless exception for WTO member states—giving member states essentially the position of *Rex non potest peccare* as long as Article XXI were invoked. See generally GATT, *supra* note 5, at art. 21

129. See WTO General Council, Proposed Agenda, Item VI WT/GC/W/498 (May 13, 2003); WTO Council for Trade in Goods, *Waiver Concerning the Kimberley Process Certification Scheme for Rough Diamonds: Communication*, G/C/W/432/Rev.1 (Feb. 24, 2003); WTO Council for Trade in Goods, *Kimberley Process Certification Scheme for Rough Diamonds- Request for a Waiver*, G/C/W/431 (Nov. 12, 2002) (including a reprint of the Kimberley Process Certification Scheme).

130. See Docking and U.S. Sen. Leahy, *supra* note 63.

sanctions if a Kimberley participant imports diamonds from particular diamond mines rather than particular diamond producing countries. In this sense, the WTO waiver for the Kimberley Certification Scheme polices trade between a nation and a sub-national level of another nation, i.e. particular diamonds mines.

Even though the WTO has opted to respect the Kimberley Certification Scheme by creating a special waiver, it is not altogether clear that a special waiver was necessary. Sanctions to conform to Kimberley could have been justified under Article XXI.¹³¹ Article XXI(c) would have excused sanctions because the United Nations initiated Kimberley and the U.N. General Assembly as well as the U.N. Security Council have supported the scheme.¹³² Sanctions would also have fallen within Article XXI(b)(ii) and Article XXI(b)(iii) because the conflict diamonds relate directly to the traffic in weapons and the funding ties to al-Qaeda are of profound concern for national security interests of many WTO member states.¹³³

This applicability of Article XXI for sanctions under the Kimberley Scheme illustrates an example in which sanctions may be utilized to address national security concerns that primarily exist at the sub-national level of other countries. The WTO waiver system for Kimberley does not impose sanctions directly on sub-national regions, but it does impose diamond sanctions on countries that trade with uncertified mines. This is just one step removed from direct sanctions on such mines. Thus, it is not entirely without related precedent to suggest that Article XXI sanctions could be imposed on sub-national regions.

B. Advantages of Regional Sanctions

1. Effective Against Non-State Terrorism

By identifying a precise area for sanctions, regional sanctions can more effectively isolate and publicly identify a base of terrorist operations and financing than conventional sanctions that restrict trade for an entire nation. Prohibitions on the trade of goods from a particular area within a country may help prevent terrorists from co-mingling their exports with legitimate exports in that country in the attempt to hide the exports used to finance terrorism. The co-mingling of terrorism financing exports—often narcotics—with legitimate

131. See Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds"*, 24 MICH. J. INT'L L. 1177 (2003).

132. *Id.* at 1185.

133. *Id.* at 1185–86.

goods is the means in which a majority of narcotics are shipped to the U.S.¹³⁴ Indeed, the illegal drug trade is a major source of terrorism funding, used for funding by a wide array of terrorist organizations, including the IRA, the Kurdistan Workers Party or PPK, Kosovo Liberation Army, Hezbollah, Hamas, Abu Sayef, al-Qaeda, Tamil Tigers, the United Wa Army, ETA, FARC, ELN, and Shining Path.¹³⁵ As previously mentioned, although the trade in narcotics is not a WTO issue per se since the GATT does not provide trade protection for narcotics, the fact that illegal drugs are often trafficked by being co-mingled with legitimate goods does make the shipment of narcotics an issue that touches upon the security of legitimate, WTO-protected trade.

Terrorist organizations also engage in what on the surface appears to be legitimate businesses. Not only does al-Qaeda, for example, use honey and baked goods businesses as fronts for fundraising,¹³⁶ Osama bin-Laden himself has been tied to various construction companies, currency trading firms, and export-import businesses.¹³⁷ Indeed, the business network of terrorist organizations is truly multinational.¹³⁸ Al-Qaeda and other radical Islamic groups are suspected of receiving funding from Al Taqwa, a group of companies in Switzerland, Liechtenstein, the Bahamas, and Italy, with shares of business throughout Europe, the Middle East, and Africa. Al Taqwa has cement plants, drydocks, textile and brick factories, a division that trades factories, and a division that trades steel, wheat, oil, and other commodities.¹³⁹ The business networks that fund al-Qaeda and similar terrorist groups certainly rely on globalized trade facilitated by the WTO. Thus, the sanctions available in the WTO regime, amongst them notably Article XXI, have the ability to minimize the terrorist funding.

Effective Article XXI sanctions, however, ought to target only the areas with terrorist ties and not entire nations, because targeted sanctions have the potential to isolate terrorist havens from not only the rest of the world, but also from within the countries the terrorist havens are located. Particularly in geographically larger WTO member states, such as the E.U., China, and India, where terrorist financial activity might occur in a small area of the member's borders, regional sanctions imposed over only the relevant region might isolate

134. See Barnard, *supra* note 93, at 33.

135. *Id.* at 32.

136. Bruce Zagaris, *The Merging of the Counter-Terrorism and Anti-Money Laundering Regimes*, 34 LAW & POL'Y INT'L BUS. 45, 52 (2002) (naming Al-Hamati Sweets Bakeries, Al-Nur Honey Press Shops, and Al-Shifa Honey Press as three businesses tied to al-Qaeda funding); Napoleoni, *supra* note 55, at 158–59.

137. Zagaris, *supra* note 136.

138. *Id.* at 70.

139. *Id.*

terrorists more completely by deterring those outside of the sanctioned area from co-mingling their exports with goods originating in the sanctioned region.

The U.S. imposed regional sanctions within Afghanistan in 1999 by enacting a comprehensive embargo on "goods, software, technology (including technical data), or services" to the Taliban and "to the territory of Afghanistan controlled by the Taliban."¹⁴⁰ In practice, this meant that the majority of Afghanistan was under sanction that prohibited trade and financial exchange between Americans and Afghans since the Taliban controlled a majority of Afghanistan. Nonetheless, the trade sanction against Taliban controlled territory may serve as a model as to how regional sanctions can disassociate sub-national regions from national political boundaries, and thus focus more of the world's attention on the terrorists themselves. Indeed, shortly after the U.S. imposed sanctions on the Taliban, the U.N. Security Council adopted sanctions against the Taliban and even demanded that the Taliban hand over Osama bin-Laden.¹⁴¹ Future use of regional sanctions could likewise bring public attention to terrorist organizations and perhaps help mobilize multilateral efforts to isolate terrorist havens from funding.

Regional sanctions could be particularly useful in preventing money transfers in the form of illegal *hawala* banking, a form of banking and money transfers prevalent in Southeast Asia and many Muslim nations and known for its paperless trail and informal arrangements.¹⁴² *Hawala* operates by the transferor of money asking a *hawaladar* to transfer a specified sum to the transferee, who may be in another country.¹⁴³ The *hawaladar* gets in touch with his contact, another *hawaladar*, near the transferee.¹⁴⁴ The *hawaladar* near the transferee gives the specified sum to the transferee. At some later point, the *hawaladars* exchange goods to balance the account.¹⁴⁵ This is a method in which money can be transferred without currency ever having to cross national borders. The system also lacks written records since personal contacts are relied on and *hawaladars* operate trusting one another. Because of the lack of

140. Himamauli Das, *The United States Sanctions Response to the Attacks of September 11, 2001: A Synopsis of Remarks at the NESL Rogue Regimes Conference*, 36 NEW ENG. L. REV. 943, 950 (2002). The sanction against the Taliban controlled areas of Afghanistan was Executive Order 13129, Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 7, 1999).

141. Das, *supra* note 140, at 951–52. The U.N. Security Council actions against the Taliban are: S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

142. Fletcher N. Baldwin, Jr., *Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT'L L. 3, 13–15 (2002).

143. *Id.*

144. *Id.*

145. *Id.* (Baldwin adds that the *hawala* system is like a "Western Union without the high tech gear and exorbitant transfer fees").

records in *hawala* and its reliance on personal knowledge and trust, it is an incredibly difficult system for investigators to crack, even when investigators know where it exists, such as in the “*hawala triangle*” of Dubai, Pakistan, and India.¹⁴⁶

Regional trade sanctions could disrupt areas known to engage in terrorist-related, cross-border *hawala* money transfers by simply prohibiting the trade in goods from those areas, thus removing a means of transferring money between *hawaladars*.¹⁴⁷ Regional sanctions definitely would not eliminate altogether the transfer of funds to terrorists by *hawala*, but regional sanctions may make using trade in goods a difficult substitute for the transfer of more easily traceable cash.¹⁴⁸ Moreover, imposing regional sanctions in order to combat unsavory uses of *hawala* would bring greater public awareness of this still relatively unknown practice, which could place more scrutiny on suspected terrorism-related *hawala* dealings.¹⁴⁹

2. Effective for International Relations

Regional trade sanctions may perhaps be most beneficial in how they could improve trade relations between countries and provide more courses of action for times when sanctions are desirable. The decision to impose trade sanctions is usually controversial with many points of view, not least because conventional trade sanctions—sanctions imposed on an entire country—adversely affect various third parties,¹⁵⁰ although sanctions are viewed as the more humane and less politically controversial alternative to the heavy bluntness of armed military conflict for resolving international disputes.¹⁵¹ If sanctions are levied against an entire developing country, however, the impact on the people in the country who do not have any role in why the sanctions

146. *Id.*, at 15–17.

147. Baldwin, *supra* note 142.

148. *Id.*

149. *Id.*

150. For the controversy over the Helms-Burton Act on third parties *see, e.g.*, Schloemann and Ohlhoff, *supra* note 21; for the effect sanctions against Iraq had on that country's civilian population, *see* Henshaw, *supra* note 71.

151. *See* JOHN F. MURPHY, STATE SUPPORT OF INTERNATIONAL TERRORISM (Westview Press, Inc. & Mansell Publishing Ltd 1989); Kenneth W. Abbott, *Economic Sanctions and International Terrorism*, 20 VAND. J. TRANSNAT'L L. 289, 303 (1987). It has been suggested that economic and trade sanctions may address the root causes of terrorism far more effectively than military intervention. *See, e.g.*, Sean D. Murphy, *International Law, the United States, and the Non-Military 'War' Against Terrorism*, 14 Eur. J. INT'L L. 347 (2003). The United Nations Security Council has long used sanctions instead of military intervention in response to terrorism. *See, e.g.*, sanctions imposed on Libya for failing to surrender two Libyan nationals suspected of bombing Pan Am Flight 104, S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) and S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993).

were imposed in the first place may disproportionately suffer, such as how the sanctions against Haiti actually enriched the Haitian government because the government profited off of the contraband economy at the expense of the mass populace.¹⁵² Sanctions resulting in mass poverty lead to humanitarian crises and possible fertile breeding ground for ideological and religious extremist terrorism, whereas economic growth and a rise in population-wide prosperity are powerful factors that diminish the appeal of ideological terrorism.¹⁵³ Indeed, an expansion of free trade—the very opposite of trade sanctions—in order to encourage economic growth in developing countries is a policy advocated to counteract the conditions that foster terrorism.¹⁵⁴

Regional sanctions provide a way to hinder the economic activity of terrorist organizations while also mitigating as much as possible the unintended consequences of impoverishing a large portion of a nation's population. By confining the area imposed with sanctions, regional sanctions are ethically more justifiable for not causing nation-wide humanitarian crises. Regional sanctions are also strategically smarter by not contributing to conditions friendly to the breeding of terrorist ideology.

Regional sanctions, unfortunately, still may impose harsh economic conditions on innocent populations who live near terrorist base camps. Considering the close proximity such populations are to terrorist ideology and propaganda, it is not unreasonable to conclude that, suffering from sanctions, such people may be more disposed to assist terrorist organizations, thus aggrandizing the problem of terrorism. Regional sanctions, however, at least limit imposed economic hardship as much as possible, and consequently limit the pool of potential people who may feel more inclined to ally with terrorists in response to the effects of sanctions. Additionally, sanctions may not influence the allegiance of those who happen to live near a terrorist base of operations and who consequently feel oppressed by the local terrorist group. For example, the terrorist organizations in Colombia, FARC, AUC, and ELN, are known for brutally terrorizing those who live under their rule.¹⁵⁵ Also, the Shining Path of Peru is known for its inhumane actions against locals.¹⁵⁶ Regional sanctions

152. Cann, *supra* note 10, at 466.

153. Fandl, *supra* note 72, at 609 (emphasizing that "Eradicating poverty is the single most potent solution to the problem of terrorism.").

154. See Robert B. Zoellick, *Countering Terror With Trade*, WASH. POST, Sept. 20, 2001, at A35; Brink Lindsey, *The Trade Front: Combating Terrorism with Open Markets*, TRADE POLY'S ANALYSIS no. 24 (Aug. 5, 2003).

155. See, e.g., Julia E. Sweig, *What Kind of War for Colombia?*, FOREIGN AFF. Sept.-Oct. 2002, at 122.

156. See Ravi Nair, *Confronting the Violence Committed by Armed Opposition Groups*, 1 YALE HUM. RTS. & DEV. L.J. 1 (1998) (assessing the difficulties in countering human rights violations committed by non-governmental armed groups against the populations that the groups are based in).

have the possibility of breaking local population dependencies on the “terror economy,” which may be beneficial for such local populations in the long term as such populations reintegrate with the mainstream economy, even if short term consequences might be economically painful.¹⁵⁷

By only focusing on regions hiding terrorist organizations and attempting not to impose harsh economic conditions on populations in other areas, regional sanctions may appear less hostile on the whole than an entire nation being sanctioned. Additionally, regional sanctions might dispel many of the suspicions that governments often possess when sanctions are imposed on them in the name of national security, especially since national security has not been a well-defined concept, and arguably an elastic concept. Indeed, developing nations tend to view Article XXI sanctions as nothing more than political acts expressive of a wealthier country’s foreign policy and economic interests, with little regard for real national security concerns.¹⁵⁸ Regional sanctions would encourage a greater degree of transparency because regional sanctions are by their nature more geographically precise, consequently leaving less room for speculation as to ulterior motives for the imposition of sanctions. Reducing cynicism for Article XXI sanctions ought to be a high priority for Western nations since trust between the West and the developing world is critical in the fight against terrorism, which is evident by the increased multilateral efforts to confront terrorism, as represented by recent counter-terrorism activities by such diverse regional organizations as the ASEAN,¹⁵⁹ the OAS,¹⁶⁰ the APEC,¹⁶¹ and the E.U.¹⁶²

Unfortunately, the developing world has observed in the past what has appeared to be hypocrisy in the application of purported national security trade sanctions. For instance, the U.S. imposed sanctions on India and Pakistan after both countries detonated nuclear tests, but agriculture and food were exempted from the sanctions in order to satisfy important constituencies in the U.S.¹⁶³ Also, the U.S. has given inconsistent treatment between China, which was given Normal Trade Relations status,¹⁶⁴ and Cuba, which has been subjected to

157. Napoleoni, *supra* note 55, at 109–10 (presenting the harsh suffering of local populations that become dependent on a “terror economy” imposed by locally dominant non-state terrorist organizations).

158. Cann, *supra* note 10, at 419–20.

159. ASEAN, *supra* note 45.

160. *See supra* note 46.

161. *See supra* note 42.

162. Fuller, *supra* note 44.

163. Cann, *supra* note 10, at 451.

164. Normal Trade Relations for the People’s Republic of China, Pub. L. No. 106–286, 114 Stat. 880 (codified as amended in scattered sections of 19 U.S.C. & 22 U.S.C.) (authorizing the President of the United States to approve China’s entry into the WTO).

harsh trade and investment sanctions under the rationale that Cuba is a security threat and human rights violator.¹⁶⁵ Cuba may very well be a gross violator of human rights, and the Caribbean communist country certainly has contributed to state-sponsored terrorism in the past,¹⁶⁶ but there does appear to be double standards in treating China vastly differently from Cuba considering China's less-than-reputable human rights record and past support of secretive North Korea. Because of such inconsistencies in employing national security sanctions, developing countries tend to be wary of Article XXI sanctions.¹⁶⁷

To overcome this cynicism and win back the confidence and trust of developing countries, it is imperative for the West to utilize Article XXI sanctions honestly and with a clear purpose. Regional sanctions have the advantage of conveying more clearly the rationale for the sanction. Covering a more geographically limited area than conventional sanctions, regional sanctions would not shut out as much trade as conventional sanctions, thus offering fewer opportunities for a target nation to speculate that protectionism may have been an ulterior motive in imposing sanctions.

Not only could regional sanctions reduce skepticism from developing countries of Article XXI sanctions, but in some cases governments may willingly cooperate with the prospect of having sanctions imposed on a region of the country that is under the influence of terrorist organizations. Currently, the government of Colombia cooperates with the U.S. government in fighting against the left-wing narco-terrorist and rebel group FARC that operates in Colombia and in fact controls significant territory within Colombia's borders.¹⁶⁸ Likewise, the U.S. has worked with the government of Pakistan in order to search for al-Qaeda and Taliban encampments in the remote provinces of Pakistan.¹⁶⁹ The Pakistani government, indeed, imposed economic sanctions on its own north-west region in order to counteract non-state terrorism.¹⁷⁰ It is not too inconceivable to think that governments like Colombia and Pakistan, which suffer from certain areas being controlled by terrorist organizations, might cooperate rather willingly to cut off trade to and from the terrorist controlled areas. With the assistance of major trading partners imposing sanctions on the

165. For a summary of the Helms-Burton Act of 1996 imposed against Cuba, see Schloemann and Olhoff, *supra* note 21, at 427–30.

166. LAQUEUR, *supra* note 73, at 180–81.

167. Cann, *supra* note 10, at 450–51.

168. Andy Webb-Vidal, *FARC Poised for New Battle in Long War*, FIN. TIMES (Asia ed.), Apr. 11, 2005, at 2; Marika Lynch, *Rebels Say They're Holding Americans; Colombia's FARC Assails U.S., Demands Prisoner Exchange*, MIAMI HERALD, Feb. 25, 2003, at A3.

169. David Johnston, *Raid on Feb. 13 Smoothed Way in al-Qaeda Arrest*, N.Y. TIMES, Mar. 4, 2003, at A1.

170. Farhan Bokhari, *Pakistan Lifts North-West Region Sanctions*, FIN. TIMES (Asia ed.), Sept. 27, 2004, at 2.

terrorist-controlled areas, it might make the attempt to financially isolate a sub-national region far more successful than if a weak central government tried to on its own control the trade of a province ruled by terrorists. Consequently, regional sanctions may actually be seen by some governments that have difficulty maintaining authority over terrorist controlled regions as a welcome tool.

C. Possible Criticisms of Targeted Sanctions

1. Lack of Relevance and Effectiveness

In spite of the advantages that regional sanctions may offer, there exist a number of possible objections to such a sanction scheme. One criticism might be concerning the relevance of analyzing Article XXI. Because of the present ambiguity of Article XXI,¹⁷¹ the notion of justifying regional sanctions based on Article XXI may be irrelevant, since many WTO member states might be hesitant to justify trade sanctions on the wording of an unpredictable Article XXI, especially for unorthodox regional sanctions.¹⁷² Unwillingness on the part of nations to refer to Article XXI for sanctions would render the issue moot. Nonetheless, the strength of the WTO lies in its relatively formalized structure, at least in comparison to its far more informal predecessor GATT, which suggests that respect for its rules-based procedure is a large part of the WTO's appeal, as evident in its significant case load.¹⁷³ Thus, it is important for the sake of formalized rules to explore the possible interpretations and applications of GATT articles, including Article XXI.

A perceived lack of effectiveness in curbing terrorist financing may also raise questions of relevance in analyzing regional sanctions. The Kimberley Certification Scheme, for example, has come under criticism from some NGOs for the Scheme's absence of "regular independent monitoring."¹⁷⁴ Naturally, regional sanctions might also be subjected to similar criticism, being measures imposed by nation states without necessarily any input or monitoring from independent sources. Although criticism of the Kimberley Certification Scheme may be relevant to regional sanctions because of their similarity, criticism on the grounds of lack of independent oversight can be applied to any

171. See generally *supra* note 40.

172. "Even developed countries, often on the receiving end of expansive U.S. "national security" measures, are likely to resist contorting the language of article XXI to justify even "smart" sanctions measures for fear that damaging precedent will be established." Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HMN. RTS. DEV. L.J. 1, 48 (2002).

173. See Bacchus, *supra* note 31.

174. Daniel L. Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT'L ECON. L. 835, 866 (2003).

form of government imposed sanctions, including conventional state-to-state sanctions. Indeed, the absence of NGOs in measuring the effectiveness of sanctions is a fault that would be hardly unique to regional sanctions.

2. The Problem of Standing

A possible procedural issue that regional sanctions raise is the difficulty in understanding the applicability of standing. The first question is whether a terrorism-related sanction imposed on a sub-national area of another WTO member state would even qualify as a proper Article XXI sanction. Article XXI was drafted explicitly to protect the security and sovereignty of states.¹⁷⁵ Of course it is reasonable to speculate that the drafters foresaw national security threats from non-state origins, but it may be too much to think that anything other than member states would be targets under Article XXI. After all, GATT only treats member states as parties to the GATT framework, which means only member states may participate in WTO panel and Appellate Body proceedings. This might seem to suggest that only sanctions against another member state are relevant for GATT exceptions, including the national security exception of Article XXI. A regional sanctions scheme as suggested by this Paper, however, conceptually fits into the mold of conventional sanctions against states, with only the geographical scope of the sanction being the difference from conventional sanctions.

From a practical point of view, it is difficult to imagine that the WTO would refuse to hear a complaint from a member state about how it alleges it is an unjust victim of an Article XXI sanction solely because the sanction does not cover 100 percent of the member state's territory.¹⁷⁶ If the WTO were to refuse to hear a complaint based on such rationale, then a risk-averse nation wanting to impose sanctions without having to defend the sanctions would simply always leave a small percentage of the target nation's territory sanction-free. This would be an absurd loophole to avoid WTO panel reviews. Therefore, member states likely would have standing to challenge a sanction that does not completely cover the member state's territory.

Additionally, parallels may be drawn between targeted sanctions and limited wars or otherwise known as imperfect wars—wars conducted between two countries but with restraint and typically with limited political goals, such as the U.S.'s involvement in Kosovo and Serbia.¹⁷⁷ This is not to suggest that

175. See Akande & Williams, *supra* note 13.

176. For the moment, please set aside other possible reasons a WTO panel may not review the complaint, including deference to a nation imposing Article XXI. For a summary of varying opinions on this issue, see *supra* note 40.

177. Michael Hahn, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351, 2361–62 (2001).

trade sanctions are anything like war, but only that both may be utilized in a geographically limited fashion. Since imperfect or limited restrictions are recognized in the conduct of warfare, certainly the more benign retaliation of sanctions can be used in a limited or imperfect way, especially if very specific political goals are the object, such as financially crippling terrorist organizations.

A far more difficult potential problem of regional sanctions is to determine who has standing to bring a complaint to the WTO if a member state actually welcomes sanctions on a certain region within its borders. Do private individuals from the region suffering targeted sanctions have standing to bring a complaint to the WTO if the national government supports the sanctions? For example, assuming the Colombian government would welcome regional trade sanctions against FARC-held territory, would private individuals in FARC-held territories be permitted to challenge the sanctions to the WTO panel? The WTO dispute settlement process has been criticized from those who feel that NGOs ought to play a larger role in dispute settlement by being able to file *amicus* briefs in panel and Appellate Body hearings.¹⁷⁸ Many member states, however, adamantly expressed concern when the Appellate Body in the *EC—Asbestos* case adopted an *ad hoc* procedure for the filing of *amicus curiae* briefs from non-state interests, since WTO dispute resolution procedures do not explicitly provide for the possibility for unsolicited *amicus curiae* briefs.¹⁷⁹ As a result, the Appellate Body was informed to exercise extreme caution for using *amicus curiae* briefs in the future.¹⁸⁰ Institutional inertia also tends to keep out new plans for representation of non-members at WTO panels.¹⁸¹

Nonetheless, the trend in the world seems to be moving towards more individualized remedies in intergovernmental actions. Intellectual property rights are already recognized by the WTO as a private right.¹⁸² Human rights as called for in the U.N. Covenant on Civil and Political Rights and the European Convention on Human Rights grant private rights.¹⁸³ In a very limited fashion, the U.N. Security Council permits individuals in exceptional cases to

178. See Charnovitz and Bradlow, *supra* note 67.

179. Complaint against EC, *European Communities-Measures Affecting the Prohibition of Asbestos and Asbestos-Containing Products*, WT/DS135 (May 28, 1998); Peter Van den Bossche, *The WTO Dispute Settlement System and Arab and Islamic Countries*, in *STRENGTHENING RELATIONS WITH ARAB AND ISLAMIC COUNTRIES THROUGH INT'L L.* 192–93 (2002).

180. *Id.*

181. Weiler, *supra* note 69.

182. Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 J. INT'L ECON. L. 111, 120 (2002).

183. *Id.*

appeal U.N. sanctions.¹⁸⁴ Along with this trend, one could reasonably assert that individuals who reside in an area affected by regional sanctions and whose national government approves of such sanctions ought to be recognized as having standing in the WTO as a matter of equity. Otherwise, individuals in the affected areas would have no effective remedy. Admittedly, however, this in itself is not sufficient reason to grant such affected individuals standing—individuals today are affected by other countries' trade regulations, but only member states may bring complaints forward to the WTO, which essentially leaves private individuals today at the discretion of their government. Perhaps this question of standing is not so difficult after all, especially if it is compared to a conventional trade regulations, e.g. anti-dumping rules, in which an industry requests the government to reply to an alleged violation, requiring the government to determine what course of action, if any, to take.¹⁸⁵

3. National Treatment

Regional sanctions would certainly bring about a difference in treatment within the same country between those goods that are under sanction and those that are not. If a national government is perceived as complicit with this kind of outside difference in treatment, it may raise questions of legality under the GATT. Namely, would individuals residing in an area affected by regional sanctions be able to bring a complaint alleging violation of national treatment if the national government seems supportive of the targeted sanctions? The underlying notion of national treatment is that foreign and domestic products are treated equally; a fundamental principle of the GATT/WTO regime.¹⁸⁶ With regional sanctions, though, the difference in treatment would not be between imported products and domestic products, but rather between domestic products from different regions of the same home country. Moreover, national treatment requires a member state not to treat like products—between imported and domestic products—differently in its own territory. With regional sanctions, however, the sanctioning government—the foreign government—would be the one treating sub-national regions abroad differently. Even if the

184. See S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 22, 2003). The Committee established pursuant to Res. 1521 permits individuals in exceptional cases to appeal travel sanctions as authorized by Res. 1521. Procedures for Maintaining and Updating the List of Persons Subject to Travel Restrictions Pursuant to Resolution 1521 (2003), Mar. 16, 2004, available at http://www.un.org/Docs/sc/committees/Liberia3/1521tbl_proc.pdf (last visited Mar. 9, 2006).

185. It cannot be overstated, however, that governments sometimes willingly serve as mere nominal parties to WTO disputes, with non-state actors, i.e. affected domestic industries, being the real interested parties. Jeffrey L. Dunoff, *The Post-Doha Trade Agenda: Questions about Constituents, Competence, and Coherence*, in *THE WTO AND THE DOHA ROUND: THE CHANGING FACE OF WORLD TRADE* 79 (2003).

186. GATT, *supra* note 5, art. 3.

subjected area's national government were to consent to regional sanctions, this could only be regarded as a passive form of acceptance rather than official measures of enactment, such as regulations, laws, or taxes that intend to treat like products differently.

An analysis of possible objections to regional sanctions suggest that there may be little problem in employing regional sanctions. Questions like standing for non-member states are controversial, however, and will have to evolve between those who wish to keep the WTO dispute resolution process in the hands of states and those who wish to expand it. This Paper will not come to a conclusion on that question, which is a very large topic in and of itself. Regardless of the position one adopts, though, regional sanctions might still be permitted because even in conventional sanctions governments have the right to choose whether or not to challenge the sanctions, and choose not to do so over the requests of private entities within the government's territory.

Likewise, national treatment probably ought not to be an issue in deciding the legality of regional sanctions. Because imported products and domestic like products would not be treated differently by the nation receiving sanctions, it would not be a case of national treatment as understood in the traditional sense. Consequently, after assessing possible criticisms of regional sanctions using the same lines of analysis for judging the legitimacy of conventional sanctions, regional sanctions still appear to be a plausible option within the GATT/WTO framework.

IV. CONCLUSION

Questions about regional sanctions are not mere academic inquiries into the theoretical limits of Article XXI, but rather reflect an acknowledgment that trade sanctions may increasingly need alternative models in order to adapt to a new age of international, non-state sponsored terrorism. Terrorist organizations, like many other organizations, have become globalized, shedding their nation-state identities. The conventional method of imposing sanctions on an entire nation, consequently, may be ineffective in counteracting non-state threats. Sanctions, if they are to be used—arguably instrumental in disrupting funds for terrorism and more benign than military intervention—ought to reflect the changing nature of terrorism. Just as terrorist organizations have increasingly not allowed formal national boundaries to define their scope of activities, neither should sanctions.

Furthermore, an inquiry into the possible forms of Article XXI sanctions ought to be raised in order to ensure compliance with the WTO framework. It may be tempting for a nation that does impose regional sanctions on another WTO member state to deny the applicability of Article XXI, should the target nation question the legitimacy of the sanction to the WTO. This Paper, though,

attempts to present the view that regional sanctions are indeed covered under Article XXI and are permitted under Article XXI. Thus, assuming the WTO panel has the authority to review Article XXI sanctions, regional sanctions in the name of national security ought to be reviewable by the WTO.

The applicability of the GATT articles is a critical issue for examining possible criticisms of regional sanctions, such as perceived problems with standing and perceived problems of national treatment. Regional sanctions most likely can survive such critiques, however. Overall, regional sanctions should not have any more difficulties in overcoming these questions than conventional sanctions.

Regional sanctions offer a pragmatic and possibly more humanitarian method of imposing trade sanctions. Also, regional sanctions attempt to find the balance between expanding free trade for increased prosperity, a tool for fighting off the influences of terrorist ideology, and placing pressure on the financial resources of terrorist organizations. For these extraordinarily important policy reasons, regional sanctions ought to be seriously considered as a legitimate alternative within the WTO/GATT framework.